Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-743

LOCTITE CORPORATION,
Petitioner,

vs.

BROADVIEW CHEMICAL CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondent respectfully requests this Court to deny Petitioner's Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit entered on September 16, 1971, in its Cause No. 71-1441.

PETITIONER'S QUESTIONS PRESENTED

Respondent denies that this case presents any question that merits the attention of this Court and, further, submits that petitioner's "Questions Presented for Review" should more properly be stated as follows:

1. In view of the Court of Appeals extensive review of the "controversy" between the parties and its conclusion that petitioner's "threatening" letter to its own representatives did not merit further inquiry, was not petitioner accorded due process of law?

2. Since the Court of Appeals held "there *is* a justiciable controversy" at the oral argument, was not such action consistent with (not in conflict with) the requirement of the Supreme Court and the Ninth Circuit Court of Appeals that a "controversy" must "exist at the hearing"?

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's recital of the "facts" is in many respects accurate, but in many respects is subjective, argumentative, and incomplete. Therefore, respondent submits the following supplemental statement of fact:

In their briefs and at the oral argument, the parties differed on the "issue" on appeal. Petitioner contended, in essence, that jurisdiction over the Manaka compositions was in issue. Respondent contended, on the other hand, that the sole issue was whether the trial court abused its discretion in temporarily suspending the $2,000.00 infringement penalties because of petitioner's deliberate delay in taking an infringement position in the present action.

During the hearing before the Court of Appeals, petitioner outlined the history of litigation between the parties and, as it had done in its brief, petitioner again renounced the "threatening" letter of February 17, 1967 from peti-

tioner's President to its representatives. Petitioner repeated the arguments made in its brief and urged, in essence, that depositions of respondent's customers was needed to attack jurisdiction over respondent's Manaka compositions.[1]

In addition to arguing that the trial court had not abused its discretion, respondent emphasized the factual controversy *between the parties*. Respondent referred to the Consent Decree of 1967, the Contempt Decision of 1968, the Injunction of 1969 (including the $2,000.00 penalties for each infringement by each officer, director, employee, attorney, etc.), and the aggressive and protracted litigation between the parties (which is too extensive to reproduce for the Court).

At the conclusion of the oral argument, the Court of Appeals ruled from the bench:[2] "We agree with you, Mr. Ames [counsel for petitioner], the jurisdictional issue is before us on this appeal. We find that there *is* a justiciable controversy and affirm the District Court Order . . ." (emphasis added).[3]

REASONS FOR DENYING THE WRIT

A. There is No Conflict in the Courts.

Petitioner alleges that "the only theory" underlying the Court of Appeal's affirmance was that petitioner "had

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[1] This question was resolved by the Court of Appeals adversely to petitioner in the dismissal of an earlier appeal No. 71-1339.

[2] This quote is almost verbatim and is reproduced word for word from respondent's counsel's notes made within minutes after the Court's ruling.

[3] Petitioner filed before the Court of Appeals a "Petition for Rehearing and Rehearing En Banc" and made the same arguments to the Court of Appeals as it now makes to this Court. The Petitions were separately denied by the Court of Appeals.

already had its day in Court in 1969 when it contested the original action as to the KBK compositions . . ." After setting up this "straw man," petitioner then argues that this theoretical action of the Court of Appeals is in conflict with the Court of Appeals in *Sellers* v. *Regents of University of California*, 432 F.2d 493 (9th Cir. 1970), which held that "the 'controversy' must exist at the time of the hearing."

The truth is that the "straw man" is the product of petitioner's imagination and is inconsistent with the facts. Actually, the Court of Appeals specifically considered the pertinent facts in existence *at the time of the hearing*. It then flatly ruled "there *is* a justiciable controversy" involving the Manaka compositions. Thus, the Court of Appeals below acted consistently with (not in conflict with) the Ninth Circuit Court of Appeals and the Supreme Court.[1]

B. There Was No Denial of Due Process to Petitioner.

As a losing litigant before the District Court and the Court of Appeals, petitioner resorts to its "denial of due process" argument. This argument on its face is totally without merit.

As pointed out above, the Court of Appeals extensively reviewed the "controversy" *between the parties* as it existed at the time of the hearing. Specifically, the Court of Appeals considered the facts, as they related to petitioner and respondent, to adequately establish a "controversy" so as to provide jurisdiction over the Manaka compositions. It properly concluded that any attitude or state of mind of petitioner's representatives (to which the 1967 letter was addressed) or of respondent's customers was irrelevant

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[1] See *Golden* v. *Zwickler*, 394 U.S. 103 (1969).

and/or moot. As such, Petitioner's desire to explore through depositions the attitude or state of mind of these representatives or customers was likewise irrelevant and/or moot.

The important point is the Court of Appeals evaluated the factual relationship between petitioner and respondent and, *on this basis alone,* properly concluded that "there is a justiciable controversy" over the Manaka compositions.

CONCLUSION

The Petition for Certiorari does not raise any questions that are appropriate for review by the Supreme Court. The alleged conflict in the circuits and with a decision of this Court does not exist. The alleged denial of due process is contrived and is void of any merit. Accordingly, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on January 5, 1972, one copy of this Brief was mailed, first class; postage prepaid to: Walter D. Ames, Esq., Watson, Cole, Grindle & Watson, 815 Fifteenth Street N.W. Washington, D.C. 20005, J. Rodney Reek, Esq., Loctite Corporation, North Mountain Road, Newington, Connecticut 06111, and Ralph C. Dixon, Esq., Day, Berry & Howard, One Constitution Place, Hartford, Connecticut 06103.

Granger Cook, Jr.